ORAL ARGUMENT SCHEDULED FOR APRIL 13, 2026

Case No. 25-5302

IN THE

United States Court of Appeals for the District of Columbia Circuit

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MEDIA MATTERS FOR AMERICA,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia
(No. 1:25-cv-01959)
Hon. Sparkle L. Sooknanan, J.

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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Dated: February 23, 2026

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel certifies:

Parties and *Amici Curiae*:

a. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the government's brief.

b. The Cato Institute is a not-for-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3); it has no parent corporation; and no publicly held company has a 10% or greater ownership interest in the Cato Institute.

Rulings Under Review:

References to the rulings at issue appear in the government's brief.

Related Cases:

This case was not previously before this Court. Two cases involving similar issues were before this Court, *see Media Matters for Am. v. Paxton*, No. 24-7059 (D.C. Cir.) and *Media Matters for Am. v. Bailey*, No. 24-7141 (D.C. Cir.), and the United States District Court for the District of Columbia, *see Media Matters for Am. v. Paxton*, No. 1:24-cv-00147 (D.D.C.), and *Media Matters for Am. v. Bailey*, No. 1:24-cv-00147 (D.D.C.).

/s/Thomas A. Berry
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Counsel for Amicus Curiae

Dated: February 23, 2026

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/s/Thomas A. Berry
Dated: February 23, 2026 Thomas A. Berry

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato Institute scholars have published extensive research on constitutional law and government overreach. This case interests the Cato Institute because it concerns the legality of a contested exercise of government power that threatens freedom of speech and freedom of the press.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the time of America's Founding, the people exercised their First Amendment rights through pamphlets and periodicals; in the 21st century, the people also exercise such rights online. Regrettably, government officials have sometimes responded to speech by attempting to silence it. Such government efforts can occur

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus* contributed money intended to fund the brief's preparation or submission.

by both overt and covert means. In some respects, overt attempts by government to stifle speech are less dangerous, largely because they are more noticeable and more easily resisted; in contrast, covert attempts by government to silence speech are subtle, informal, and deniable. The term of art that courts have adopted for such covert pressure is "jawboning."[2]

The recent controversy over Jimmy Kimmel's televised remarks provides an instructive example. After Kimmel discussed "the MAGA gang" and the killing of Charlie Kirk, Federal Communications Commission (FCC) Chairman Brendan Carr commented, "These companies can find ways to change conduct and take action, frankly, on Kimmel, or there's going to be additional work for the FCC ahead." Bobby Allyn, *Legal experts say pulling Jimmy Kimmel from air may amount to illegal 'jawboning,'* NPR (Sept. 18, 2025, 6:17 PM).[3] ABC then paused Kimmel's show indefinitely. *Id*. After significant backlash, Kimmel returned, but the possibility of FCC retaliation persists. John Koblin & Michael M. Grynbaum, *Back on air, Jimmy Kimmel defends free speech in an emotional monologue*, N.Y. TIMES (Oct. 9, 2025);[4] Irie Sentner & Ben Johansen, *Trump floats stripping networks critical of him*

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[2] *See, e.g.,* ANDREW M. GROSSMAN & KRISTIN A. SHAPIRO, SHINING A LIGHT ON CENSORSHIP: HOW TRANSPARENCY CAN CURTAIL GOVERNMENT SOCIAL MEDIA CENSORSHIP AND MORE 1 (2023), https://tinyurl.com/swt76z69.

[3] Available at https://tinyurl.com/ycxp2au2.

[4] Available at https://tinyurl.com/ye2x2zne.

of their broadcast licenses, POLITICO (Sept. 18, 2025).[5] The government jawboned ABC and its affiliates through threats of government action when it pressured them to suspend Kimmel's show.

This case exemplifies how covert jawboning can lead to overt retaliation, and how overt acts can implicitly threaten even more escalation. In the case at hand, the Federal Trade Commission (FTC) first jawboned Media Matters (a nonprofit media company) by assembling a team of personnel who had threatened retaliation for an article it published. Then the FTC made good on those threats by conducting a baseless investigation of Media Matters. And that investigation carries with it the not-so-veiled threat of future adverse legal action.

The article that began this sequence of events was published in November 2023, when Media Matters reported that "ads appeared next to pro-Nazi content on X.com." Compl. ¶ 2; Doc.38 at 11. Elon Musk responded by promising to file "a thermonuclear lawsuit against Media Matters." Elon Musk (@elonmusk), X (Nov. 18, 2023, 2:01 AM).[6] Mr. Musk then sued. The social media service Mr. Musk leads, X, has since unsuccessfully sued Media Matters around the world. Doc.38 at 11.

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[5] Available at https://tinyurl.com/yp9ej7wm.

[6] Available at https://tinyurl.com/a923dx3a. Mr. Musk spent at least $288 million supporting Republican candidates during the 2024 election cycle. Doc.38 at 18.

When Elon Musk talks, people listen: Stephen Miller, the current White House Deputy Chief of Staff, promoted Mr. Musk's call for legal action, observing pointedly, "There are 2 dozen+ conservative state Attorneys General." Stephen Miller (@StephenM), X (Nov. 19, 2023, 11:48 pm).[7] The Missouri and Texas Attorneys General then issued civil investigative demands (CIDs) to Media Matters; both CIDs were preliminarily enjoined. Doc.38 at 11–12.

After the failure of those CIDs, President Trump appointed a vocal critic of advertiser boycotts as the new FTC Chairman. Doc.38 at 12. Before Andrew Ferguson became the FTC Chairman, he said he would "[i]nvestigate . . . advertiser boycotts," according to a leaked memo. Doc.38 at 18. Mr. Ferguson also replied "Antitrust enforcers should take this seriously" to an X post which demanded that "The orchestrated advertiser boycott against X and popular podcasts must end immediately." *Id.*

After coming to the FTC, Mr. Ferguson brought in staffers who expressed disapproval of Media Matters, including one who had called Media Matters "scum of the earth." Doc.38 at 20; Jon Schweppe (@JonSchweppe), X (Nov. 30, 2023,

[7] Available at https://tinyurl.com/mr6hj8z7.

12:34 PM).[8] The FTC then issued a CID to Media Matters. Doc.38 at 12. That CID was ostensibly meant to investigate advertiser boycotts of certain platforms. *Id.*[9]

In response, Media Matters sued the FTC for its retaliatory CID. That lawsuit argued that the CID prevented "Media Matters and its staff from engaging in speech and press activities protected by the First Amendment." Comp. ¶ 84; Doc.38 at 12. The lower court granted a preliminary injunction. Doc.38 at 58. Its opinion was clear: "This case presents a straightforward First Amendment violation." Doc.38 at 11. The FTC appealed. Notice of Appeal ¶ 1.

This Court should affirm. The district court's holding that the FTC unconstitutionally retaliated against Media Matters rests on decades of First Amendment jurisprudence and centuries of free speech protection. The freedom of the press was born from widespread concern and "revolutionary ferment." David Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487–88 (1983). For this reason, the Constitution's text protects freedom of the press unreservedly. Since the Founding, our courts have consistently protected the freedom of the press

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[8] Available at https://tinyurl.com/bde5bkk4.

[9] Notably, ideologically motivated boycotting is a constitutionally protected activity. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 932–33 (1982) (holding that the NAACP was not liable for the nonviolent boycott of white merchants). The constitutionally protected status of advertiser boycotts raises related, additional questions about the appropriateness of the FTC's CID.

from new threats and in the face of new technological developments. And the protection of that freedom includes the prevention of jawboning.

The district court correctly held that the FTC engaged in unconstitutional retaliation; Cato writes separately to explain why the FTC *also* engaged in unconstitutional jawboning. What separates jawboning from the legitimate exercise of government power? The best way to distinguish the two in these circumstances is a test like the one laid out by Justice Samuel Alito's dissent in *Murthy v. Missouri*. Justice Alito urged courts to analyze jawboning by examining public officials' authority, the statements they have made, and the reaction of those who have been jawboned. *Murthy v. Missouri*, 603 U.S. 43, 99–100 (2024) (Alito, J., dissenting).[10] Here, those factors demonstrate that the FTC unconstitutionally coerced Media Matters to stay silent, providing an independent reason to affirm the decision below and to uphold the lower court's injunction.

Alternatively, this Court could examine the factors that the Supreme Court examined in *Vullo*—namely, government power and the coercive nature of the communications. *NRA of Am. v. Vullo*, 602 U.S. 175, 191–94 (2024). Under that lens

[10] In *Murthy*, the Court held that plaintiffs lacked standing and declined to provide a test for jawboning. *See Murthy*, 603 U.S. at 76. Thus, nothing in the majority opinion contradicted or foreclosed Justice Alito's proposed test.

as well, the FTC's actions should also be found unconstitutional—that is because the FTC has significant authority, and the threat it made was clear.

Two years ago, Elon Musk wrote: "If we lose freedom of speech, it's never coming back. Beware of censorship lest ye censored." Elon Musk (@elonmusk), X (Apr. 24, 2023, 8:22 PM).[11] He was right to warn about censorship—even though he and the FTC have now both used the legal process as a tool to silence. Of course, the public and private actors in this case are far from the only entities who threaten the free press; these days, the press's First Amendment protections regularly come under fire. *See, e.g.*, David Bauder, *New York Times, AP, Newsmax among news outlets who say they won't sign new Pentagon rules*, AP (Oct. 13, 2025, 10:47 PM);[12] Bridget Brown et al., *Trump sues Wall Street Journal and Rupert Murdoch over reporting on Epstein ties*, AP (July 18, 2025, 9:50 PM);[13] Eli Tan, *Meta Removes Facebook Group That Shared Information on ICE Agents,* N.Y. TIMES (Oct. 15, 2025).[14]

The nation's courts have an inescapable responsibility to protect the public from government jawboning. Absent judicial protection, bad actors in government

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[11] Available at https://tinyurl.com/mryxxykb.

[12] Available at https://tinyurl.com/3ect958r.

[13] Available at https://tinyurl.com/3hv2jyza.

[14] Available at https://tinyurl.com/5cuw4szx.

will continue to exercise covert pressure campaigns against disfavored expression. Courts must guard against the prospect of continual erosion of First Amendment freedoms. When federal agencies attempt to chill speech and dilute the Constitution's guarantees, they should face consequences.

ARGUMENT

"The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).[15] Jawboning generally, and the FTC's actions in particular, intrude upon this right and threaten to collapse *Terminiello*'s distinction between a free society and a dictatorship.

I. FIRST AMENDMENT PROTECTIONS INCLUDE PROTECTIONS FROM JAWBONING.

The fight for the freedoms protected by the First Amendment long predates the Founding Era. Nearly 2500 years ago, Euripides knew what it meant not to speak freely: "A slave's life!" EURIPIDES, THE PHOENICIAN WOMEN 34 (William Arrowsmith, ed., Peter Burian & Brian Swann trans., 1981) (original text dating to

[15] *See W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 641 (1943) ("Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.").

409 BC). And in 1689 the English Bill of Rights—an ancestor of the American legal tradition—cemented the freedom of speech in Parliament. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 433 (1983).

The push to protect the freedom of the press in America stemmed from disenchantment with English rule. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 785 (2008). In fact, when a royal governor asked Massachusetts's Great and General Court in 1768 to refer a newspaper publisher to a grand jury for libel, the Massachusetts House refused, calling liberty of the press "a great Bulwark of the Liberty of the People." Anderson, *supra*, at 463. It borrowed this phrase from Cato's Letters—a compilation of essays, widely admired by Americans at the time, which called free speech "the great Bulwark of Liberty." 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS; OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 100 (4th ed., 1737). Colonial legislatures also utilized the phrase "bulwark of liberty" to refer to freedom of speech and of the press. Jay, *supra*, at 785.

Many Revolutionary Era texts reinforced the freedom of the press. In 1774, the Continental Congress sent a letter to Quebec that called freedom of the press one of the "five great rights." *See Near v. Minnesota*, 283 U.S. 697, 717 (1931) (quoting I JOURNAL OF THE CONTINENTAL CONGRESS 108 (Library of Congress ed., 1904)).

Nine state constitutions of the Revolutionary period also protected the freedom of the press. Jay, *supra*, at 787. Subsequently, the Articles of Confederation proclaimed in 1781 that "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress." Bogen, *supra*, at 434; William F. Swindler, *Our First Constitution: The Articles of Confederation*, 67 A.B.A. J. 166, 166 (1981).[16]

But it took time for the First Amendment to be realized. Initially, the Constitutional Convention of 1787 deemed an explicit provision guaranteeing free expression in the Constitution to be unnecessary, given the limited and enumerated powers of Congress. Jay, *supra*, at 788–89. However, a few years later, Madison included protections for speech, press, assembly, and petition in the Bill of Rights that he proposed to Congress. *Id.* at 790. After some editing, the Amendment was sent to the states for ratification and was ratified in 1791. *Id.* at 791; J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights, 1789-1791*, 25 UNIV. RICH. L. REV. 433, 434 (1990). The First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.[17]

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[16] Local assemblies in the colonies also guaranteed freedom of speech for legislative debate. Bogen, *supra*, at 433.

[17] Bogen, *supra*, at 437 (the phrase "Congress shall make no laws" was first proposed in New Hampshire's constitutional ratification convention regarding religious freedom).

The Founders were not afraid of the press. We should not be either. Not a single person expressed fear of the press during the Constitutional Convention and First Congress. Anderson, *supra*, at 488. In fact, the only attempt to limit the press was struck down. *Id.*

Our nation's constitutional tradition rests on increasingly robust protections of the freedom of the press. For example, in 1931, the Supreme Court protected the publishing of a periodical that suggested law enforcement was ineffective in Minneapolis. *Near*, 283 U.S. at 704–05, 722–23. In doing so, the Court struck down a law making it a nuisance to publish a "malicious, scandalous and defamatory" periodical. *Id.* at 702, 722–23. In 1964, a Montgomery, Alabama city commissioner sued the New York Times for publishing an advertisement that allegedly defamed him. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–58 (1964). The Supreme Court held that defamation against public officials required "actual malice." *Id.* at 279–80. In doing so, the Court emphasized larger First Amendment values: "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. In 1971, the Supreme Court protected the First Amendment rights of the New York Times and the Washington Post to publish classified information about the Vietnam War because "[a]ny system of prior restraints of expression comes to this

Court bearing a heavy presumption against its constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

In short, protecting the freedom of the press is one of the nation's strongest constitutional traditions. And that tradition has come to include protections from jawboning. When the government restrains expression, there is "a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70. "Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *Am. Commc'ns Ass'n v. Douds,* 339 U.S. 382, 402 (1950). As a general matter, "a government official cannot do indirectly what she is barred from doing directly"; in particular, such principles imply that jawboning is incompatible with the First Amendment. *Vullo*, 602 U.S. at 190 (citing *Bantam Books*, 372 U.S. at 67–69).

II. THE FTC JAWBONED MEDIA MATTERS.

"The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy,

J., concurring).[18] Here, the government has failed to meet that obligation. Above and beyond the explicit First Amendment retaliation that the FTC engaged in when it issued the CID, the FTC has also jawboned Media Matters. If the lower court were reversed, the FTC would very likely continue its unfounded fishing expedition. That would mean continued government pressure on Media Matters to remain silent, which would weaken protection for not just Media Matters but of the press in general.

A. The Supreme Court Has Repeatedly Affirmed that Jawboning Violates the First Amendment of the Constitution.

Jawboning occurs "when a government official threatens to use his or her power—be it the power to prosecute, regulate, or legislate—to compel someone to take actions that the state official cannot." WILL DUFFIELD, JAWBONING AGAINST SPEECH 2 (2022).[19] In short, it is "enforcement through informal channels." Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 61 (2015).

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[18] As James Madison acknowledged, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (Jonathan Elliot ed., 1836). The government will always view some members of the press as meddlesome, abusive, or misguided. But freedom of the press cannot rest on whether the government agrees with views or tactics of any particular member of the press—in this case, Media Matters.

[19] Available at https://tinyurl.com/5n76a8fn.

The First Amendment protects us all from this sort of government coercion, because "Freedom of speech and of the press are fundamental rights which are safeguarded by the . . . Constitution." *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The government "may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023); *see also, e.g., NIFLA v. Becerra*, 585 U.S. 755, 766 (2018); *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995). The government cannot be a newspaper editor: The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a law that regulated what a newspaper could publish). Such restriction is coercion, and "government officials may not coerce private entities to suppress speech." *Murthy*, 603 U.S. at 78 (Alito, J., dissenting); *see Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

The covert nature of jawboning does not insulate it from the force of the First Amendment. The Constitution prohibits not only overt government commands to suppress speech but also more informal pressure; that is because "a government

official cannot do indirectly what she is barred from doing directly." *Vullo*, 602 U.S. at 190 (holding that the NRA plausibly alleged that the superintendent of the New York Department of Financial Services coerced entities regulated by the Department to dissociate with the NRA to silence the NRA's gun advocacy). Therefore, "a public official who tries to shut down an avenue of expression of ideas and opinions through 'actual or threatened imposition of government power or sanction' is violating the First Amendment." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (quoting *Am. Fam. Ass'n, Inc. v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002)).

Courts have long understood that freedom of speech and of the press must be protected from "subtle governmental interference." *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960). In *303 Creative*, for example, the Supreme Court held that Colorado could not compel a web designer to create websites for marriages she did not endorse; that is because such compulsion would require the designer either to "speak as the State demands or face sanctions for expressing her own beliefs." *303 Creative LLC*, 600 U.S. at 570, 589. In *Bantam Books*, the Court also held that a commission notifying publishers and local police departments of obscene works was unconstitutional, because it acted as a thinly veiled threat. *Bantam Books*, 372 U.S. at 61–63, 67–71.

The boundaries of jawboning sometimes lack bright lines, and the Supreme Court has not yet provided one simple rule for evaluating claims of jawboning. The best approach would be to adopt Justice Alito's three-factor framework from his dissent in *Murthy* or one like it. *See Murthy*, 603 U.S. at 99–100 (Alito, J., dissenting). As explained below, the *Murthy* dissent's framework is preferable because it homes in on the key factors underlying unconstitutional jawboning; furthermore, multiple lower courts appear to rely on that framework or one very much like it. Alternatively, this court could use *Vullo*'s more holistic approach. In any event, either approach results in the same conclusion: the FTC's actions are unconstitutional. *See Vullo*, 602 U.S. at 191–94.[20]

B. The FTC's Jawboning Is Unconstitutional Under the Logic of Justice Alito's *Murthy* Dissent.

Justice Alito's *Murthy* dissent proposes three factors to determine whether the government has engaged in unconstitutional coercion: "(1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced." *Murthy*, 603 U.S. at 99–100 (Alito, J., dissenting) (citing *Vullo*, 602 U.S. at 189–90, 189 n.4, 191–94).

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[20] The lower court correctly found that Media Matters was likely to show unconstitutional retaliation. That is because the FTC has not only jawboned Media Matters, but it also has acted on its threat. Doc.38 at 41.

This Court should use Justice Alito's framework, or one like it, because it homes in on the key factors that help distinguish between the legitimate exercise of government power and the illegitimate exercise of "the power of the State to punish or suppress disfavored expression." *Vullo*, 602 U.S. at 188. Justice Alito's framework identifies and isolates key variables—the government actor, the statement at issue, and the statement's effect. Furthermore, this framework provides judges with a clear method that can be easily applied to varied circumstances. Justice Alito's approach also resembles multifactor tests used by lower courts of appeals since *Bantam Books*. *See, e.g., Kennedy v. Warren,* 66 F.4th 1199, 1207 (9th Cir. 2023) ("the Second Circuit has formulated a useful non-exclusive four-factor framework that examines: (1) the government official's word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the recipient perceived the message as a threat; and (4) whether the communication refers to any adverse consequences if the recipient refuses to comply."); *see also Backpage.com, LLC*, 807 F.3d at 230–232; *R. C. Maxwell Co. v. New Hope*, 735 F.2d 85, 88 (3d Cir. 1984).

This framework demonstrates that the FTC's coercion of Media Matters violates the First Amendment. First, the leadership of the FTC, the Chairman himself, pressured Media Matters; he has significant power, influence, and control. Doc.38 at 18, 20; *see, e.g., FTC Secures Historic $2.5 Billion Settlement Against Amazon,* FEDERAL TRADE COMMISSION (Sept. 25, 2025) ("The Federal Trade

Commission has secured a historic order with Amazon.com, Inc. . . . Amazon will be required to pay a $1 billion civil penalty, provide $1.5 billion in refunds back to consumers harmed by their deceptive Prime enrollment practices, and cease unlawful enrollment and cancellation practices for Prime.");[21] *see also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 602 (2014) ("the FTC has become the dominant enforcer of privacy").

Second, Mr. Ferguson repeatedly threatened Media Matters and emphasized his plan to investigate progressives. *See Bantam Books*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats"). When Mr. Ferguson was vying to be Chairman, he said he had a "track record of standing up to . . . the radical left" and would "[i]nvestigate . . . advertiser boycotts". Doc.38 at 18, 50. One year ago, Mr. Ferguson added that "antitrust laws may have something to say about what's been going on [with] . . . advertiser boycotts." Comp. ¶ 60. That same month, Mr. Ferguson proclaimed, "Now obviously, progressives . . . they're not gonna give up just because of the election, they're gonna take this to new fronts. And that's where I think that it's really important that the FTC take investigative steps in the new administration under President Trump. . . No advertiser cartels." Andrew Ferguson,

[21] Available at https://tinyurl.com/2jpfmxtn.

Bannon's WarRoom, Show Clip Roundup 11/30/2-24 [AM], BANNON'S WAR ROOM (Nov. 30, 2024).[22] Finally, Mr. Ferguson responded "Antitrust enforcers should take this seriously" to an X post which demanded that "The orchestrated advertiser boycott against X and popular podcasts must end immediately." Doc.38 at 18.[23] These statements were threats; more precisely, they were conditional threats, and the condition of those threats—Mr. Ferguson's appointment to the FTC—was satisfied. *See, e.g., Holloway v. United States,* 526 U.S. 1, 7 (1999) (the intent of a threat "may be either 'conditional' or 'unconditional'").

Third, Media Matters was prevented from exercising its First Amendment rights. Doc.38 at 12; Comp. ¶ 84. The FTC prevented "Media Matters and its staff from engaging in speech and press activities protected by the First Amendment." Comp. ¶ 84; Doc.38 at 12. The FTC's actions made it difficult for Media Matters to pursue stories, retain employees, and receive FTC communications. *See* Doc.38 at 18. The FTC's threat was not theoretical—its investigation followed Media Matters'

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[22] Available at https://tinyurl.com/2vch6nyu.

[23] An FTC staffer also suggested that the employees of Media Matters deserved enforcement scrutiny because of their political affiliations. The FTC's Director of Public Affairs, Joe Simonson, posted, "Media Matters employed a number of stupid and resentful Democrats who went to like American University and didn't have the emotional stability to work as an assistant press aide for a House member." Doc.38 at 20.

November 2023 article and Mr. Musk's call for action. Doc.38 at 11–12. In short, the FTC didn't just try to silence Media Matters; it succeeded.

This court might also consider adopting a slight modification of Justice Alito's framework—more precisely, it might consider adopting a slight modification of the final factor of Justice Alito's three-factor test. Instead of confining its examination to the actual "reactions of the third party alleged to have been coerced," the court might expand that examination to include an assessment of how a party subjected to jawboning might reasonably react. That expansion is worth judicial consideration because of the possibility of a future victim of jawboning who refuses to react to coercion at all. In that hypothetical case, a jawboning victim's refusal to react would make the result of the third factor's examination an empty set. Under Justice Alito's framework, that result would presumably lessen the likelihood of a finding of jawboning—an outcome that appears counterproductive and unfair. An expansion of Justice Alito's third factor—one that included both a factual assessment of how the third party actually reacted and a legal assessment of how that third party might reasonably react—eliminates the prospect of that problematic outcome.

C. The FTC's Jawboning Is Also Unconstitutional Under the Approach Suggested in *Vullo*.

Furthermore, if this Court employs the Supreme Court's suggested approach in *Vullo*, the FTC's jawboning is still unconstitutional. In *Vullo*, the Court held that "A government official cannot coerce a private party to punish or suppress

disfavored speech on her behalf," but it did not implement the framework derived from *Bantam Books* and used by Justice Alito. *Vullo*, 602 U.S. at 189–91.[24] Instead, the Court focused on government power and the coercive nature of the communications. *Id.* at 191–94.[25] It held that violating the First Amendment through coercion of a third party requires "conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." *Id.* at 191. It also noted that "who said what and how, and what reaction followed, are just helpful guideposts in answering the question whether an official seeks to persuade or, instead, to coerce." *Id.*

Under this more general test, the FTC's actions were still unconstitutional. The government power and nature of the communications are significant—the FTC wields enormous power, and the FTC Chairman and staffers have denounced Media Matters. Doc.38 at 18–20. The FTC's actions "convey a threat of adverse

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[24] The Court in *Vullo* noted, "Since *Bantam Books*, the Courts of Appeals have considered similar factors to determine whether a challenged communication is reasonably understood to be a coercive threat." *Vullo*, 602 U.S. at 189. However, the Court declined to adopt this framework generally, calling it "nonexhaustive." *Id.* at 191. As noted above, Justice Alito adopted a version of this framework in his *Murthy* dissent. *See Murthy*, 603 U.S. at 99–100 (Alito, J., dissenting).

[25] Ultimately, the Court held only that the complaint plausibly alleged a First Amendment violation. *Vullo*, 602 U.S. at 194. Because of the posture of the case, the implications of the decision remain limited. Nonetheless, that decision shows what is required to state a claim that the government violated the First Amendment. *Id.* at 191.

government action," namely retaliation, investigation, and litigation, and they "suppress the plaintiff 's speech" about X and Elon Musk. *See Vullo*, 602 U.S. at 191. Media Matters must "speak as the State demands" or "face sanctions." *See 303 Creative LLC*, 600 U.S. at 589. This leaves Media Matters with an impossible choice—speak and face retaliation or be silent and evade it. Retaliation could mean reputational damage, loss of income, and significant legal fees, leaving the company with no meaningful options. *See Cooksey v. Futrell*, 721 F.3d 226, 231, 236–37 (2013) (holding that a person of ordinary firmness would feel a chilling effect when a state agency threatened an injunction and a state board emailed suggestions for that person's website, adding that it was monitoring the situation). In short, Media Matters was coerced into silence, and its silence confirms its coercion. Doc.38 at 23 ("The declarant also identified particular stories that Media Matters would have pursued but for the FTC CID").

This Court should take its lead either from the more holistic analysis of jawboning presented in *Vullo* or from the more administrable alternative that gives clearer direction to lower courts presented in Justice Alito's *Murthy* dissent. Whether this Court adopts *Vullo*'s analysis or that of Justice Alito's *Murthy* dissent (or, indeed, that of a framework very much like Justice Alito's), the FTC has violated the First Amendment.

CONCLUSION

For the reasons in this brief and those described by Plaintiff-Appellee, this court should affirm the decision below.

Respectfully submitted,
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I hereby certify that on February 23, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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